

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-50

In re Applications of

GOLDEN CORNERS
BROADCASTING, INC.
(Hereafter "GCBI")

File No. BPH-901218MH

FISHER
COMMUNICATIONS
OF CLEMSON, INC.
(Hereafter "Fisher")

File No. BPH-901219MB

CLEMSON
BROADCASTING, INC.
(Hereafter "CBI")

File No. BPH-901219MD

MATT PHILLIPS,
JOEL KAY AND
BEVERLY LOCKRIDGE,
A PARTNERSHIP,
d/b/a FM 104.9
BROADCASTING
(Hereafter "FM 104")

File No. BPH-901218MD
[Dismissed Herein]

For Construction Permit
for a New FM Station on
Channel 285A (104.9 MHZ)
in Clemson, South Carolina

HEARING DESIGNATION ORDER

Adopted: March 3, 1992;

Released: April 13, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Review of FM 104's application reveals that it has failed to respond to Section VII, Item 1, certification of public notice, in accordance with the provisions of 47 C.F.R. § 73.3580. This omission by FM 104 is considered to be a tenderability defect in accordance with the provisions of Appendix D of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). See *Taber Broadcasting Company*, 4 FCC Rcd 7892 (1989). Appendix D also states that:

If any of the defects listed above are overlooked during the initial review and are found later in the process, the application will be returned as inadvertently accepted if tender and not submitted, will not be accepted *nunc pro tunc*. Return of the application will void the application reference number inadvertently assigned and whatever rights of tender might have been asserted.

Accordingly, the application of FM 104 will be returned as inadvertently accepted for tender.¹

3. *GCBI.* On July 3, 1991 GCBI amended its application to specify a reduced tower height of 73 meters, and clarified that amendment on November 8, 1991. Both amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2), as GCBI reduced the overall height above ground of the proposed tower structure in order to satisfy FAA concerns. However, the FAA continues to maintain that the proposed site will have Electromagnetic Interference ("EMI") problems. Consequently, an air hazard issue will be added below and the FAA made a party to the proceeding. In addition, GCBI states that it will protect workers engaged in the maintenance and repair in the vicinity of the antenna by reducing or discontinuing operation. Therefore, GCBI complies with the environmental criteria set forth herein. Consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. *Fisher.* Fisher proposes to locate its transmitting antenna on a new tower. Our engineering study indicates that the applicant failed to address the matter of how it proposes to resolve any RF exposure to workers on its tower. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Fisher may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). See also, *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, an applicant must determine whether its proposal would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Fisher failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Fisher will be required to

¹ On April 10, 1991, GCBI filed a petition to deny the application of FM 104. In light of the action taken hereinabove, the

petition will be dismissed as moot.

file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessment, that the applicant's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. See 47 C.F.R. § 1.1308(d).

5. The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Fisher has filed such statement, it is deficient. Fisher has not listed a minority organization. Accordingly, Fisher will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

6. CBI. On June 4, 1991, CBI petitioned for leave to amend its application. In light of the fact that the FAA made a determination on May 13, 1991 that CBI's proposal would cause EMI problems to air navigation, CBI requests that the Commission add a condition to the authorization requiring CBI to resolve any EMI problems in the event of grant of its application, in lieu of imposing an air hazard issue in this proceeding. However, it is Commission policy to specify an air hazard issue in a hearing designation order if the FAA has determined that an applicant's proposal would constitute an electromagnetic hazard to air navigation. Therefore, CBI's petition will be denied, an air hazard will be added below and the FAA made a party to the proceeding.

7. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANTS

Fisher

AMENDMENTS FILED

June 11, 1991

8. Since the Federal Aviation Administration has determined that the antenna proposed by Fisher would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

9. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which

would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Fisher in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by GCBI, Fisher and CBI would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the application of FM 104 IS RETURNED AS INADVERTENTLY ACCEPTED FOR TENDER.

13. IT IS FURTHER ORDERED, That the petition to deny filed by GCBI with respect to the application of FM 104 IS DISMISSED AS MOOT.

14. IT IS FURTHER ORDERED, That, in accordance with paragraph 4 hereinabove, Fisher shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Fisher shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by GCBI and Fisher ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the petition for leave to amend filed by CBI IS DENIED to the extent indicated in paragraph 6.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau